



**MIDDLE WATERWAY ACTION COMMITTEE**

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June 17, 2002

**Via E-Mail & Regular Mail**

Hylebos NRD Settlement Proposal Comments  
Attn: Ms. Gail Siani  
NOAA Damage Assessment and Restoration Center NW  
7600 Sand Point Way NE  
Seattle, Washington 98115-0070

Re: Commencement Bay Nearshore/Tideflats ("CB/NT") Superfund Site – Comments on  
Hylebos Natural Resource Damage (NRD) Settlement Proposal

Dear Ms. Siani:

The Middle Waterway Action Committee ("MWAC") appreciates this opportunity to comment in writing on the Hylebos Natural Resource Damage Settlement Proposal ("NRD proposal"). We understand that the NRD proposal addresses the Trustees' natural resource damage claims in the Hylebos Waterway and identifies how the Trustees intend to pursue the assessment of damages and recovery of these alleged damages, if any.

Depending on the public comments that are received by the Trustees on the NRD proposal and the final version that is ultimately adopted by the Trustees (if any), MWAC may look to elements of this NRD proposal for guidance in developing a restoration-based settlement proposal. This letter includes comments on the NRD proposal as they might relate to a potential settlement of unresolved liabilities, if any, for each alleged injury to natural resources in the Middle Waterway that has been solely or substantially caused by acts of MWAC (as opposed to releases caused by other parties or by federally-permitted releases).

## **General Comments**

The Trustees characterize their proposal as providing a “neutral, independent scheme for allocating liability among Hylebos Waterway facilities.” However, the scheme that the Trustees have come up with seems less than neutral, rather confusing and likely to result in legal challenges.

The term “natural resources” is defined under CERCLA to include land, fish, wildlife, biota, air, water, ground water, drinking water supplies and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, any state or local government, any foreign government, any Indian tribe, or is such resources are subject to a trust restriction on alienation, any member of an Indian tribe. 42 United States Code (“U.S.C.”) §9601(16).

The United States and the State of Washington as Trustees are limited to using funds they recover to restore, replace, or acquire the equivalent of such natural resources that were destroyed, injured, or damaged. 42 U.S.C. §9607(f)(1). Additionally, the statute prohibits double recovery for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. *Id.* Furthermore, there shall be no recovery of natural resource damages where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980. *Id.*

## **Assessment Costs and Attorneys’ Fees**

The Trustees should limit the amount of assessment costs they seek to recover from potentially responsible parties (“PRPs”) to only costs that were both reasonable and necessary to conduct the assessment. At least one court has held that assessment costs in excess of the expected damage recovery are not recoverable. Additionally, general experimental research studies on the biological effects of hazardous substance releases are not compensable as assessment costs.

CERCLA Section 107(a)(4)(C) allows recovery only of the “damages” for injury to natural resources and “the reasonable costs of assessing such injury.” The statute does not provide for the Trustees’ recoupment of their attorneys’ fees. Attorneys’ fees should not be included as assessment costs.

## **Injury Assessment**

MWAC believes that the Hylebos NRD proposal significantly overestimates the alleged injury to Hylebos Waterway natural resources. MWAC further believes that the alleged

allocated shares of that injury attributed to the pertinent sites could be problematic if applied to other sites such as the Middle Waterway.

MWAC has the following specific comments and questions regarding assumptions and inputs in connection with the NRD proposal:

1. MWAC has reviewed the documents cited for the elevation breaks in Appendix C and finds no scientific justification or explanation for elevation ranges listed. The upper limit of sub-tidal (-10 MLLW) is based on the behavior of juvenile salmonids (function) and given the importance of salmonids. MWAC believes that function is the key to fair settlement. MWAC believes more appropriate habitat elevation breaks are as follows: subtidal (deeper than -10 feet deep), shallow subtidal (-10 to -4 feet MLLW), low intertidal (-4 to +4 feet MLLW), and high intertidal (+4 to +12 feet MLLW).
2. The broad baseline adjustment of all intertidal habitat in the Hylebos Waterway due to the Trustees' vegetated buffer arguments is overly general and does not reflect realistic baseline conditions.
3. MWAC supports the baseline degraded values for over-water structures, log rafting, and wood debris as more consistent with the applicable NRD laws and regulations. There is no evidence to support an argument that all over-water structures or those areas with log rafting activities and accumulation of wood debris are 90 percent impaired or result in "toxic leachate and anoxic bottom conditions."
4. Appendix E states "we use vector data as much as possible because of software limitations to using raster (gridded) data." MWAC feels that raster data is more useful for ArcView, the software package that MWAC proposes to use. For this reason, MWAC does not support the series of conversions that the Trustees describe as a means of avoiding raster data.
5. Although there is a subsection titled "Why Inverse Distance Weighting (IDW) is used for mapping injury footprints," the only justification given is that it is "the simplest interpolation method." MWAC feels that that this is not sufficient justification for this method. The IDW method described is most useful if the data used is relatively equally spaced spatially across the entire area analyzed. The distance between samples is highly variable in the Middle Waterway and IDW is therefore not an appropriate technique. MWAC believes that the use of the Kriging method of geostatistical analysis is more appropriate for this application. ESRI provides a simple method of applying this technique in the ArcGIS Geostatistical Analyst software package.
6. With regard to the IDW technique described, MWAC also refutes the assertion that choosing a power of 6 and 8 nearest neighbors assures that all neighbors "are within about 1000 feet of each interpolated point." This is not the case. If there are other reasons for choosing this power and number of neighbors, these reasons should be stated and an opportunity for public input should be provided. MWAC feels that the designation of splinter contours is arbitrary in the document and is being used to give undue spatial weight to relatively high concentrations of analytes in relatively small

areas. Again, a more accurate method for this type of analysis and a more preferable one for mapping injury footprints would be based on the Kriging method.

7. The method described only assures that there is one point within 1000 feet and ignores the trends in concentration. This can strongly exaggerate the spatial significance of a single sample. For this reason, MWAC supports reducing the number of neighbors used or the use of the Kriging method in place of the IDW method.
8. The arbitrary 100 foot buffer is only needed because of inaccuracies in source data. This buffer adds about 40 acres to the analysis area without any verification that the added samples are below MHHW. MWAC feels that a more consistent area of analysis would reduce the errors and confusion. MWAC supports the use of top of bank to define the area of analysis when there is no reliable MHHW line.
9. No justification is given for the use of a 10 foot output grid cell size. The choice of resolution in any spatial analysis is critical. Please explain the reasoning behind using a 10 foot by 10 foot cell in the analysis, and provide a meaningful opportunity for public review and comment on the same.
10. MWAC does not see the logic in returning immediately to vector data.
11. No explanation is given for how the barriers described in Appendix E, Step 7 are used to effectively change the IDW analysis. Please explain the technique for deploying the barriers in the analysis, and provide a meaningful opportunity for public review and comment on the same.
12. The described procedures ignore gradients of transects and gives these non-spatially explicit values an unjustifiably large spatial weight. MWAC does not support the use of any homogenized data. For example, in the Middle Waterway, all cases where a transect was found to have chemical exceedences in homogenized samples, the area was resampled, and new data was recorded as unhomogenized spatially discrete data.
13. Please explain why a natural log transform is used on the reported SOC concentration (in addition to using a power of 6 in the IDW analysis), and provide a meaningful opportunity for public review and comment on the same.
14. Please explain why the 10 default ranges of concentration are reclassified into 5 ranges, and provide a meaningful opportunity for public review and comment on the same. How does this affect the data in terms of rounding up or down?
15. Liver lesions in English sole (*Pleuronectes vetulus*) have been identified by various researchers as biomarkers for exposure from PAHs. The Trustees have proposed sediment quality restoration criteria for PAHs using synoptic sediment PAH chemistry and liver lesion data from sites along the West Coast, including the Hylebos Waterway and other Puget Sound sites. However, the Trustees' initial work attempting to correlate sediment and liver lesion data did not consider either the home range behavior of flatfish, or the considerable sediment PAH chemistry data available from other investigations within the fish sampling sites. These evaluations need to be performed.
16. Non-detect (qualified "U") data evidently were used by the Trustees (at an assumed value of 50% of the detection limit) to quantify alleged natural resource damages and to generate chemical "footprints" for allocation purposes. However, in many cases, such

data reveal nothing about the presence or absence of particular chemistry and should be rejected for the purpose of the chemical footprint analysis. Matrix interferences associated with typical PCB analyses result in elevated detection limits above the Trustees' screening level for PCBs. Similarly, high-resolution analyses of DDT and its metabolites failed to confirm the elevated detections of these chemicals as reported in the original "standard" chemical determinations. The cause of such false-positive determinations was also attributed to matrix interferences.

17. Alleged injuries to flatfish (associated with PAH exposure) and benthic infauna (associated with multiple chemical exposures) have been grossly exaggerated, and are not consistent with the considerable data available from Trustee, EPA, and other investigations that document relatively limited biological effects.

### **Service Losses and Allocation**

In their settlement proposal, the Trustees have assumed that service losses from contamination have occurred and will continue to occur at a constant rate until completion of remediation. See March 14, 2002 Review Draft, page 13. This is a false assumption. Sources of hazardous substances have been controlled and will continue to naturally attenuate. The Trustees should assume that service losses from contamination have occurred at a constantly decreasing rate since the date of initial disposal or release (a linear decrease of service loss). This would be consistent with the Trustees' assumption that areas subject to natural recovery will take 25 years to recover. Id. Additionally, the Trustees' assumption that it will take 10 years for actively remediated areas to fully recover is far too conservative and not supported by monitoring data from actual dredging and capping projects. A conservative 4-year (roughly linear development) restoration time frame estimate is appropriate and should be incorporated into the Habitat Equivalency Analysis ("HEA").

The Trustees should take the commercial value of the land that is being dedicated to habitat restoration into consideration when crediting Discounted Service Acre Years ("DSAYs") or monetary payment towards natural resource damages. The Trustees are asking the PRPs to dedicate land in an industrial zoned area to be used as natural habitat in perpetuity. Furthermore, the Trustees are valuing their damages in DSAYs. Properties located on the waterfront are often valued at significantly higher values than non-waterfront property. If waterfront property is dedicated solely as a restoration project in the future, there is also lost rents and use from the property in the future for the current owner. The owner then has to reconfigure the property to maximize its habitat potential to get the most DSAY credits.

Therefore, it is possible, if not likely, that a PRP would incur losses and costs far in excess of its potential liability for damages by: (1) dedicating a piece of property zoned for industrial and commercial uses, potentially worth in excess of a million dollars; (2) hiring a consultant and design firm to layout the most beneficial habitat for the site for several tens of thousands of dollars; and (3) actually building the restoration project for several more hundreds

of thousands of dollars. Additionally, the PRP must agree to fund the Trustees' oversight of its project and to pay an allocated share of the Trustees' past damage assessment costs. After going through all this expense, the Trustees under the NRD proposal could still claim that the DSAYs for the project come up short.

The Trustees must credit DSAYs to facilities in which the Port of Tacoma ("Port"), the City of Tacoma ("City"), and the Washington Department of Natural Resources ("DNR") are not the sole PRPs. Since the Trustees are leaving it to the individual PRPs to allocate between themselves at any given facility, the Trustees must agree to accept the PRP-generated allocation to the City, the Port or DNR at a multiple PRP facility. Any DSAYs at a multiple PRP facility that are allocated to the City, the Port, or DNR (or any other party who has entered into a settlement of their alleged natural resource damage liabilities within Commencement Bay) should be credited before further restoration is commenced since the Trustees have already settled with these parties. Thus, for multiple PRP facilities in which the City, the Port or DNR are PRPs, the total DSAYs allocated to that facility should take into account the percentage attributable to those parties and the fact that they have already settled their alleged liabilities with the Trustees. This situation is analogous to the Middle Waterway where the City, DNR and Simpson have settled NRD claims. Non-settling PRPs should not be made to bear any inadequacy in the Trustees' settlements with other parties.

The Trustees seem to be coercing PRPs to settle early and entirely on the Trustees' terms by threatening PRPs that if they do not settle under this settlement offer, the Trustees will add biological, human use and economic losses that they claim to have not yet considered and "will re-focus any remaining Hylebos-related injury studies and damage assessment activities to address the liability of non-settling parties." See March 14, 2002 Review Draft, Page 3.

The Trustees claim to have decided to quantify natural resource injuries for settlement purposes in terms of affected habitat rather than numbers of individual species impacted. However, the Trustees have rated habitat types almost solely by its usefulness to salmon and other anadromous fish species. Most of the habitat that has been impacted by contaminants and thus that qualifies for natural resource damage assessment by the Trustees is deep subtidal areas. However, the Trustees assign the highest DSAY values to vegetated shallows, intertidal mudflats and marshes. They do so because these types of habitats are "ecologically important as food sources, rearing and refuge areas, and spawning and nursery habitat for a variety of Commencement Bay species." See March 14, 2002 Review Draft, Page 7. In fact, the Trustees have weighed habitats that they have deemed important to chinook salmon at twice the value assigned due to their importance to flatfish or birds. Id. at 8.

Through cleanup efforts in the affected sediments, PRPs will be restoring the deep subtidal area habitat. The parties cleaning up and restoring this habitat should get credited with DSAYs proportional to the area they restore in addition to any DSAYs for any purely restorative projects.

Liability for NRD damages has been allocated under the Trustees' proposal according to contaminants using one of three different approaches:

- Allocation of a contaminant footprint to a single site. This approach was used for most contaminant footprints.
- Allocation of liability by mass loading analysis within waterway segments. The Trustees followed this approach when allocating PCBs and PAHs.
- Allocation of a contaminant footprint adjacent to multiple sites by mass loading analysis was also used by the Trustees.

Sites were allocated liability if the site was found to satisfy a three-part test. The Trustees first had to identify a pathway for contaminants to be released from the site and to reach into the waterway. Next, the Trustees had to determine that they felt that there was evidence that an activity on the site was a likely source of the contaminant or that there was evidence that showed a release of a chemical likely to exacerbate the impact of a contaminant. Finally, the Trustees also had to find evidence of site contamination as a result of a permit violation, surface water contamination, groundwater contamination, soil or sediment contamination and/or a sediment footprint in very close proximity to the site.

When assessing allocation to different facilities, the Trustees must take into consideration whether the releases that have allegedly caused the injury to the natural resources were federally permitted. The Trustees may only recover damages for injuries resulting from releases that were not expressly permitted, which exceed the limitations established by a permit, or which occurred during a time when there were no permits. The Trustees must also show that the damage for which recovery is sought is causally linked to an act of the person from whom recovery is sought. The Trustees must show that a release associated with a particular facility was the sole or substantial cause of the injury to natural resources. If that injury can be shown to be divisible, then joint and several liability will not attach.

By the Trustees quantifying damages in this way and using HEA, it may be perceived by some that the Trustees are merely seeking to remove land in Commencement Bay from, and penalizing PRPs for the legitimate and historical use of land for, industrial and commercial purposes consistent with the zoning code and other law. This is not the purpose of natural resource damage assessment. It is not to compensate for legitimate uses of land that have historically-developed areas. By using this HEA analysis in this manner, the Trustees appear to be misusing the authority that they have been granted under CERCLA.

Very truly yours,

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Kim Maree Johannessen, on behalf of the  
Middle Waterway Action Committee

KMJ:mae

cc: Middle Waterway Action Committee  
David Templeton, Anchor Environmental, L.L.C.



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bcc: Donald Scaramastra, Esq.